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Supreme Court of the United States.

#36

OCTOBER TERM, 1965.

No. [redacted]

DUKE LEE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Petitioner, Duke Lee Lewis, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on November 10, 1965, affirming the judgment of the District Court wherein the petitioner was convicted of selling marihuana to a federal agent in the petitioner's *home,* to which the federal officer (in disguise) gained entrance by means of stealth and deception, *without a search warrant* and for the *purpose* of soliciting a crime and obtaining evidence from one suspected of a crime.

Opinion Below.

No opinion was rendered in the District Court and the brief opinion of the United States Court of Appeals for the First Circuit is printed in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on November 10, 1965, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Can a federal officer avoid the necessity of obtaining a search warrant and gain entrance to the *home* of one suspected of a crime by disguising himself and gaining entrance by means of stealth, fraud and deception for the *purpose* of soliciting a crime and obtaining evidence to be used against the owner?
2. Is the Fourth Amendment to the Constitution of the United States violated when a federal officer, without a search warrant, disguises himself and gains entrance to the *home* of one suspected of a crime by means of stealth, fraud and deception for the purpose of soliciting a crime and obtaining evidence and does so?
3. Should the petitioner's motion to suppress evidence have been allowed?

Constitutional Provisions Involved.

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of Case.

At the trial the evidence showed that a federal narcotics agent, by prior arrangements and by posing as a restaurant operator from Rhode Island, gained entrance to the *home* of the petitioner on two separate occasions in December of 1964 for the express *purpose* of purchasing a quantity of marihuana; that purchases were made in the petitioner's *home* by the agent, who did not have a search warrant; that the agent went to the home of the petitioner anticipating and for the purpose of making a purchase, and after the agent had sufficient reasons and time (over a year) to obtain a search warrant (R. 6-14). Some pertinent testimony of the agent on the petitioner's motion to suppress the evidence was as follows:

Direct Examination of Agent.

"Q. At some time during your investigation prior to the arrest of Mr. Lewis [April, 1965] did the defendant Mr. Lewis become a suspect? A. Yes, he did. . . . I was aware of him as a suspect as far back as 1963." (R. 7.)

"Q. On or about Thursday, December 3, 1964, . . . did you communicate by telephone with the defendant prior to going to his home? A. Yes, sir, I did." (R. 7.)

"Q. Was the purpose of your telephone call on this date, sir, to inquire about the purchase of a quantity of marihuana? A. It was." (R. 7.)

"Q. At the time you went to the defendant's home on December 3d, 1964, did you suspect, from information you had received prior thereto or based on your own personal knowledge or otherwise, that a transaction might take place at the *home* of the defendant so far

as the transfer of marihuana is concerned? A. I did." (R. 8.)

"Q. When you went to the *home* of the defendant on December 3d and on December 17th, Mr. Cass, did you not go there for the *purpose* of obtaining narcotics from him? A. I did." (R. 8.)

"Q. When you went to the defendant's home on December 3d and December 17th, 1964, Mr. Cass [the agent], did you have a search warrant for that purpose? A. I did not." (R. 8.)

"Q. On said date, December 3d and December 17th, 1964, Mr. Cass, did you pose as someone other than the federal officer that you are? A. I did . . ." (One "Pollock," operating a bar and grille in Rhode Island.) (R. 7.)

The petitioner's motion to suppress the evidence was denied and he was found guilty.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals is in conflict with the decision of the Supreme Court.

In the lengthy and clearly defined language of *Gouled* v. *United States,* 255 U.S. 298, relied upon by the petitioner, Mr. Justice Clark, speaking for the Court, wrote that ". . . *entrance* to the *home* or office of a person suspected of crime . . . obtained by a representative of any branch or subdivision of the Government of the United States *by stealth* . . . or in . . . *guise* . . . whether the owner be present or not . . . falls within the scope of the prohibition of the Fourth Amendment . . ." (P. 306.) (Emphasis supplied.)

2. The decision of the Court of Appeals is erroneously based on a decision which is not in point with the issue at bar.

In reaching its decision the Court of Appeals relies solely on the case of *United States* v. *Pasquinzo* (6 Cir., 1964), 334 F. 2d 74, which, although it touches on disguise, *does not deal with the entrance into the home.* In the *Pasquinzo* case the purchase of narcotics takes place in a *drug store,* a place of business open to the public, and as such is clearly distinguishable here.

The Court of Appeals has also misinterpreted the facts of the *Gouled* case, *supra,* in its opinion, by indicating that the entrance into the office was for a "proper purpose." Quite to the contrary, the *entrance* was made by "stealth" for the purpose of acquiring evidence, as it was in the case at bar.

Furthermore, the reference to *Escobedo* v. *United States* (1964), 378 U.S. 478, as it appears in the opinion, was not cited by the petitioner in connection with the illegal entry, but rather dealt with the subsequent negotiations between the agent and the petitioner after the agent already had obtained enough evidence to arrest the petitioner, and did not advise him of his rights.

3. The decision of the Court of Appeals is in conflict with the constitutional rights of the petitioner to be secure in his home.

To enlarge the police power to this extent would be tantamount to permitting a federal officer *to enter* the *home* of a citizen *without a search warrant* in the disguise of the milkman, dry cleaner, or even a member of the clergy, for the purpose of obtaining evidence, spying or any other reason that suited the purpose.

4. The issue is of important constitutional significance and is one which ought to be clarified and settled. It has not yet been decided on this point by the Supreme Court.

There is law in the United States District Court for Massachusetts which follows the *Gouled* case; see *United States* v. *Reckis,* 119 F. Supp. 687. Up to now the only lawful manner to enter the home of a citizen by a federal officer has been by virtue of either a search warrant or an arrest warrant, to be in hot pursuit or by express invitation of the occupant. An invitation procured by fraud is not an invitation. *United States* v. *Reckis, supra.*

Where the question is repeatedly arising currently, the issue of police power versus constitutional rights is squarely on the table. Is a man's home really his castle, or is he losing ground?

5. The evidence is not in dispute.

Conclusion.

It is therefore respectfully requested that this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be granted.

Respectfully submitted,

S. MYRON KLARFELD,
20 Pemberton Square,
Boston 8, Massachusetts,
Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6610.

DUKE LEE LEWIS, A/K/A LEE D. LEWIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*, HASTIE* and McENTEE, *Circuit Judges*.

S. Myron Klarfeld, for appellant.

Edward J. Lee, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

November 10, 1965.

PER CURIAM. Defendant, convicted of selling marihuana to a government agent who had misrepresented his identity,

*Sitting by designation.

claims an unlawful search and seizure because, thus misled by the agent, he invited him to his home and there made the sales. The happy days for law violators that this claim would produce are not to be. This is not a case of a government agent gaining access for an apparently proper purpose in order to seize surreptitiously evidence of a prior crime, *Gouled* v. *United States,* 1921, 255 U.S. 298, but is one in which the agent was invited for precisely the purpose for which he went. Short of entrapment, not here maintainable, defendant can no more assert that he would not have opened the door to the agent than he can assert that he would not have made the sale. His reliance upon *Escobedo* v. *United States,* 1964, 378 U.S. 478, is quite misplaced. *United States* v. *Pasquinzo,* 6 Cir., 1964, 334 F. 2d 74.

Affirmed.

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